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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FERDINAND N. SHURTLEFF, APPELLANT,
v.
THE UNITED STATES. } No. 289.

APPEAL FROM THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant was appointed to the office of general appraiser of merchandise on July 22, 1890, by the President, by and with the advice and consent of the Senate, under the provisions of section 12 of "An act to simplify the laws in relation to the collection of the revenues," chapter 407, approved June 10, 1890 (26 Stat. L., 131). On the 24th of the same month he took the oath of office and entered upon the discharge of his duties, and continued in the discharge of those duties until May 15, 1899, when his duly appointed and qualified successor in office succeeded him in the said office. On January 17, 1899, the Secretary of the Treasury informed appellant, by a letter of that date, that

the President deemed it his duty to make some changes in the personnel of the Board of General Appraisers, and therefore, with that in view, he had directed the Secretary to request appellant to send in his resignation to take effect at the President's pleasure. The appellant promptly refused to comply with the request so conveyed and demanded that he be furnished a copy of any charges preferred against him, and that he might be given an opportunity to be heard in his own defense. So the matter stood until May 3, 1899, when the President addressed a letter to him removing him from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of his successor. Appellant never resigned the office, but continued in the discharge of its duties until relieved therefrom, as above stated, on the 15th day of May, 1899, by his duly appointed and qualified successor in office.

The said successor was first appointed on May 2, 1899, during a recess of the Senate. On December 15, 1899, he was nominated to the Senate for that office; confirmed on January 17, 1900; commissioned on January 22, 1900; took the oath of office under said last appointment on January 26, 1900, and since May 15, 1899, he has remained in the office to which he was so appointed, and been paid the salary thereof.

The appellant was never notified or informed of any charge made against him, either of inefficiency, neglect of duty, or malfeasance in office. He therefore claims that he was unlawfully removed from the office, and

has ever since been ready and willing to discharge its duties. He has made monthly demands at the Treasury Department to be paid the salary attached to said office, from May 15 to November 1, 1899, which demands were refused, and he now brings suit for the said salary.

Section 12 of the above-mentioned act reads as follows:

> That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise, each of whom shall receive a salary of seven thousand dollars a year. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in any other business, avocation, or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office. They shall be employed at such ports and within such territorial limits as the Secretary of the Treasury may from time to time prescribe, and are hereby authorized to exercise the powers and duties devolved upon them by this act, and to exercise, under the general direction of the Secretary of the Treasury, such other supervision over appraisements and classifications for duty of imported merchandise as may be needful to secure lawful and uniform appraisements and classifications at the several ports. Three of the general appraisers shall be on duty as a board of general appraisers daily (except Sunday and legal holidays) at the port of New

> York, during the business hours prescribed by the Secretary of the Treasury, at which port a place for samples shall be provided, under such rules and regulations as the Secretary of the Treasury may from time to time prescribe, which shall include rules as to the classes of articles to be deposited, the time of their retention, and as to their disposition, which place for samples shall be under the immediate control and direction of the Board of General Appraisers on duty at said port.

It is not claimed by appellees that appellant was removed either for "inefficiency," "neglect of duty," or "malfeasance in office." On the contrary, it appears that the President "deemed it his duty" to remove him in order "to make some changes in the personnel of the board of general appraisers." (R., 7.)

BRIEF OF ARGUMENT.

THE QUESTION OF LAW.

The question presented in this case is as to whether Congress intended that the general appraisers of merchandise provided for in the above-cited section should hold office during good behavior—that is to say, for life; or whether the incumbents are removable therefrom at the discretion of the President.

We think it is unnecessary to enter upon any extended discussion of this question. It would be sufficient to cite the recent case of *Parsons* v. *The United States* (167 U. S., 324). The distinction between the case at bar and that case is that in the latter the law expressly

provided a term of four years of office, while in the case at bar no term of office has been prescribed. In this respect the office from which the claimant was removed is similar to many other offices for which no definite term of tenure has been prescribed by law; for example, the office of collector of internal revenue, the office of Assistant Secretary of the Treasury, and the offices of the various bureaus in the Executive Departments. It has never been contended that the incumbents of these offices are not removable from office at the pleasure of the President, although no limitation in respect to the tenure of the offices has been prescribed by law.

The question as to the power of the President to remove all such officers, for reasons satisfactory to himself, is no longer open to discussion.

Whether any limitation can be imposed by Congress upon the exercise of that power with respect to executive offices—a limitation which this court has been very careful not to assert (*Blake* v. *United States*, 103 U. S., 232 and 236; *United States* v. *Perkins*, 116 U. S., 484; *Parsons* v. *United States*, 334–335)—is a question which does not arise in this case, because the statute does not attempt to make any such limitation; nor does it prescribe any term of office. The greatest force that can be given to the words "and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office," is to regard them as directory, and therefore not intended as an encroachment upon the executive power of removal.

(*Blake* v. *United States, supra; Keyes* v. *United States*, 109 U. S., 336.) To read these words as intended to secure a tenure of office during good behavior would be as strained a construction as to argue that section 4, Article II, of the Constitution was intended to prohibit the removal from office of civil officers of the United States except by "impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Even in cases where the statute has expressly provided for a four-years' term of office, this court has held that the fixing of a definite term of years does not grant any tenure of the office against the President's will. The court holds that the purpose of such legislation is to limit the duration of the term of office, and not to secure to the incumbent a term of office for that period. (*Parsons* v. *United States, supra*, 338.)

The learned counsel for claimant has presented an able, interesting, and elaborate argument, based upon the constitutional debates and subsequent discussions respecting the President's power of removal from office, which would be very persuasive, perhaps, if the question had not been finally settled by this court, following the practical construction of the Constitution adopted more than one hundred years ago, and never departed from by the court in any case. Mr. Justice Peckham, delivering the opinion of the court in *Parsons's case* (*supra*), has gone over the same grounds which the learned counsel for claimant reviews, and has shown that the only attempt ever made by Congress

to impose any limitation upon the power of the President to remove executive officers from office, was by the enactment of the so-called tenure of office law. That act was subsequently repealed, and in respect to its repeal the learned justice said that the intention of Congress was "to concede to the President the power of removal, if taken from him by the original tenure of office act, and by reason of the repeal to thereby enable him to remove an officer when, in his discretion, he regards it for the public good." (Ib., 343.)

It is to be observed that this court was not there admitting any power as existing in Congress to vest the title to an office in the incumbent for a term of years. The subject discussed was the repeal of the part of the tenure of office act which provided—

> That any person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate. * * *

The point made was that if Congress had any power to fix by law a tenure of office—a proposition which was contrary to all precedent—then by repealing the statute Congress "conceded to the President the power of removal," which had been uniformly exercised since the establishment of the Government.

There is nothing in the statute which provides for the appointment of general appraisers of merchandise that indicates any intention on the part of Congress to place a limit upon the President's powers of removal from office. Such an intention can not be read into it by construction or inference. To paraphrase from the opinion above cited: "Considering the construction of the Constitution in this regard, as given by the Congress of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction, we must construe this act as providing absolutely for the expiration of claimant's term of office when his duly appointed successor entered upon its duties, and hold that its silence in respect to a definite term of tenure is but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove." (Ib., 339.)

It is respectfully submitted that the court below did not commit any error in its judgment.

L. A. PRADT,
Assistant Attorney-General.

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